Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 86-69)

Amendment to the Customs Regulations Concerning the Coastwise Transportation of Certain Articles by Vessels of the Netherlands Antilles

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to add the Netherlands Antilles to the lists of nations which permit vessels of the U.S. to transport certain articles specified in § 27, Merchant Marine Act of 1920, as amended, between their ports.

Customs has been furnished satisfactory evidence that the Netherlands Antilles places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country. This amendment provides reciprocal privileges for vessels registered in the Netherlands Antilles.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in the Netherlands Antilles became effective on October 22, 1984.

FOR FURTHER INFORMATION CONTACT: Donald Reusch, Carriers, Drawback & Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the U.S. except in vessels built in and documented under the laws of the U.S. and owned by U.S. citizens. However, the 6th proviso of the Act, as amended, by Pub. L. 89-194 (79 Stat. 823, T.D. 66-176) and Pub. L. 90-474 (82 Stat. 700, T.D. 68-227), provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign

nation does not restrict the transportation of certain articles between its ports by vessels of the U.S., reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Section 4.93(b)(2), Customs Regulations (19 CFR 4.93(b)(2)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; empty barges specifically designed for carriage aboard a vessel and certain equipment for use with these barges; certain empty instruments of international traffic; and certain stevedoring equipment and material.

On October 18, 1984, the Department of State advised the Director, Carriers, Drawback and Bonds Division, of the Customs Service Headquarters that the Netherlands Antilles places no restrictions on the transportation of the articles listed in the Act by vessels of the U.S. between ports in the Netherlands Antilles. The effective date of such notification was October 22, 1984.

The Carriers, Drawback and Bonds Division is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.93(b). Therefore, the Director of the Division has determined that, effective retroactively to October 22, 1984, the Netherlands Antilles should be added to the lists of nations set forth in § 4.93(b)(1) and (2).

By Treasury Department Order 165–25 the Secretary of the Treasury has delegated authority to the Commissioner of Customs to prescribe regulations relating to §§ 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f), Customs Regulations (19 CFR 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f)). These sections relate to lists of nations entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated this authority to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office of Regulations and Rulings, who then re-delegated it to the Director, Regulations Control and Disclosure Law Division.

FINDING

On the basis of the information received from the Secretary of State, as described above, it is determined that the Netherlands Antilles places no restrictions on the transportation of the articles specified in the 6th proviso of § 27 of the Merchant Marine Act of 1920, as amended, by vessels of the U.S. between ports in the Neth-

erlands Antilles. Therefore, reciprocal privileges are accorded as of October 22, 1984, to vessels registered in the Netherlands Antilles.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, cargo vessels, maritime carriers, vessels.

Regulations Amendments

To reflect the reciprocal privileges granted to vessels registered in the Netherlands Antilles, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4, continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103; § 4.93 also issued under 19 U.S.C. 1322(a); 46 U.S.C. 883.

2. Sections 4.93(b)(1) and (b)(2), Customs Regulations (19 CFR 4.93(b)(1), (b)(2)), are amended by adding "Netherlands Antilles", in appropriate alphabetical order to the lists of nations entitled to reciprocal privileges.

Inapplicability of Public Notice and Delayed Effective Date Requirements

Because this is a minor amendment in which the public is not particularly interested and there is a statutory basis for the described extension of reciprocal privileges, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(1), a delayed effective date is not required because this amendment grants an exemption.

Inapplicability of Regulatory Flexibility Act

This document is not subject to the provisions of 5 U.S.C. 603, 604, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act." That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

Executive Order 12291

This amendment does not meet the criteria for major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S.

Customs Service. However, personnel from other Customs offices participated in its development.

Dated: March 19, 1986.

B. JAMES FRITZ,
Director, Regulations Control and Disclosure Law Division.

[Published in the Federal Register, March 25, 1986 (51 FR 10189)]

(T.D. 86-70)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued November 12, 1985, to December 30, 1985, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: March 17, 1986.

File: 218649.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback, and Bonds Division.

(A) Company: American Chrome and Chemicals Inc.
Articles: Sodium dichromate in liquid form
Merchandise: Sodium dichromate (anhydrous)
Factory: Corpus Christi, TX
Statement signed: October 11, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 6, 1985

(B) Company: Atlantic Industries, Inc.
Articles: Coal tar dyestuffs; pigments and intermediates; blends of dyestuffs; and dyestuffs reduced in strength
Merchandise: Various chemicals
Factory: Nutley, NJ
Statement signed: October 15, 1985
Basis of claim: Used in

Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 3, 1985
Revokes: T.D. 55423–C and T.D. 52718–B, to cover name change from Atlantic Chemical Corporation

(C) Company: Bristol De Puerto Rico
Articles: Sodium ampicillin sterile; ampicillin trihydrate sterile; sodium cephapirin sterile; potassium hetacillin sterile
Merchandise: Sodium ethyl hexanoate salt; ampicillin trihydrate; cephapirin acid; hetacillin
Factory: Barceloneta, PR
Statement signed: December 20, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 20, 1985

(D) Company: Carlton Forge Works
Articles: Titanium alloy billets (forged)
Merchandise: Titanium alloy ingots
Factory: Paramount, CA
Statement signed: July 31, 1985
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, November 14, 1985

(E) Company: Carlton Forge Works
Articles: Titanium alloy rough forgings
Merchandise: Titanium alloy billets
Factory: Paramount, CA
Statement signed: July 31, 1985
Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: New York, November 14, 1985

(F) Company: City Auto Stamping Co., Inc.
Articles: Automotive, agricultural, and industrial stampings
Merchandise: Hot rolled steel sheet, cold rolled steel sheet, galvanized steel sheet and zincrometal
Factory: Toledo, OH
Statement signed: October 15, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 81–190–D

(G) Company: Collins & Aikman Corporation
Articles: Dyed and/or texturized acrylic, polyester and nylon yarn

Merchandise: Undyed acrylic filament, texturized acrylic; polyester filament, texturized polyester; nylon filament and texturized nylon yarn
Factories: Graham and Hickory, NC
Statement signed: August 19, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, December 20, 1985

(H) Company: Cressona Aluminum Company
Articles: Extruded shapes, rod, bar, seamless tube and pipe
Merchandise: Aluminum and aluminum alloy ingots
Factories: Cressona, PA; Farmersville, TX
Statement signed: August 8, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 29, 1985

(I) Company: Galaxy Carpet Mills, Inc.
Articles: Tufted nylon carpet
Merchandise: Nylon yarn
Factories: Chatsworth, Dalton, and Ft. Oglethorpe, GA; South Pittsburg, TN
Statement signed: August 29, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami and Chicago, November 14, 1985

(J) Company: Great Lakes Chemical Corporation
Articles: Calcium bromide
Merchandise: Formic acid
Factory: West Lafayette, IN
Statement signed: May 6, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, December 10, 1985

(K) Company: Hell Graphics Systems, Inc.
Articles: Laser light device, scanners and scanner/lasers
Merchandise: Various components
Factory: Hauppauge, NY
Statement signed: October 14, 1985
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 84-123-H, to cover name change from HCM Graphic Systems, Inc.

(L) Company: Hoover Universal, Inc.
Articles: Motor vehicle seats and manufactured parts thereof
Merchandise: Motor vehicle seat parts
Factories: Athens, TN; Vincennes, IN; Georgetown and Cadiz, KY
Statement signed: October 4, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 78–268–B, T.D. 75–245–Q, T.D. 75–12–J, and T.D. 73–164–M

(M) Company: Hoover Universal, Inc.
Articles: Motor vehicle seats and manufactured parts thereof; other steel stampings and/or assemblies
Merchandise: Hot and cold rolled steel sheet, strip and blanks; high strength low alloy steel sheet, round steel wire, and welded steel tubing
Factories: Athens, TN; Vincennes, IN; Georgetown and Cadiz, KY
Statement signed: October 4, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 11, 1985
Revokes: T.D. 78–268–B, T.D. 75–245–Q, T.D. 75–12–J, and T.D. 73–164–M

(N) Company: ICI Americas, Inc.
Articles: Paraquat concentrate
Merchandise: PP796 and sulfacide brilliant blue dye
Factory: Pasadena, TX
Statement signed: December 21, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), November 12, 1985

(O) Company: Merck & Co., Inc.
Articles: Cilastatin sodium sterile, SP 2116
Merchandise: N,N-dibenzylethylenediamine diacetate; L-cysteine hydrochloride monohydrate; d-carboxamide; 1-bromo-5-chloropenate
Factories: Danville, PA; Elkton, VA
Statement signed: August 27, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 15, 1985

(P) Company: Merck & Co., Inc.
Articles: Imipenem sodium sterile

Merchandise: Carbonyldiimidazole; magnesium-p-nitrobenzyl malonate dihydrate; triphenylphosphine; pentanedioic acid derivative-ADC-6; benzothiazyl disulfide; diisopropylethylamine
Factories: Danville, PA; Elkton, VA; Rahway, NJ
Statement signed: August 27, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 21, 1985

(Q) Company: Meredith/Burda Company, Limited Partnership
Articles: Complete magazines
Merchandise: Machine-coated gravure paper; magazine sections
Factory: Des Moines, IA
Statement signed: November 1, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, December 16, 1985
Revokes: T.D. 80-245-P and T.D. 83-259-O, to cover successorship from Meredith Corporation

(R) Company: Michelin Tire Corporation
Articles: Rubberized tire fabric
Merchandise: 2-ply polyester cord
Factory: Sandy Springs, SC
Statement signed: October 15, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Miami, December 9, 1985

(S) Company: Mobil Chemical Company of Mobil Oil Corp.
Articles: Synthetic lubricant jet oil II
Merchandise: Heptanoic acid
Factory: Edison, NJ
Statement signed: June 14, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 29, 1985

(T) Company: Mobil Chemical Company of Mobil Oil Corp.
Articles: Lubricant ester 90 (MCP-133)
Merchandise: Heptanoic acid
Factory: Edison, NJ
Statement signed: October 8, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, November 29, 1985

(U) Company: Thomson Components—Mostek Corporation
Articles: Partially and fully fabricated semiconductor wafers and finished semiconductor devices
Merchandise: Raw silicon wafers
Factory: Carrollton, TX
Statement signed: December 3, 1985
Basis of claim: Used in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: Los Angeles (San Francisco Liquidation), December 30, 1985
Revokes: T.D. 84–169–Q, to cover successorship from Mostek Corporation

(V) Company: Thomson Components—Mostek Corporation
Articles: Finished semiconductor devices
Merchandise: Semiconductor assemblies
Factory: Carrollton, TX
Statement signed: December 3, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: Los Angeles (San Francisco Liquidation), December 30, 1985
Revokes: T.D. 84–1–P, to cover successorship from Mostek Corporation

(W) Company: Trico Products Corporation
Articles: Windshield wiper parts
Merchandise: Stainless steel wire, music spring wire, and zinc bars and slab
Factories: Buffalo, NY (3)
Statement signed: October 2, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, December 9, 1985

(X) Company: Union Carbide Corporation
Articles: UDELR polysulfone; Mindel engineering resins; Radel® polyarylsulfone; Kadel polyketone; Ardel® polyarylate
Merchandise: Monochlorobenzene; bisphenol A; bisphenol S; dimethyl sulfoxide; thionyl chloride; 4', 4'-difluorobenzophenone; hydroquinone
Factory: Marietta, OH
Statement signed: July 1, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 13, 1985

(Y) Company: Van De Mark Chemical Co., Inc.
Articles: Ethyl centralite
Merchandise: N-ethyl aniline

Factory: Lockport, NY
Statement signed: June 25, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, December 10, 1985

(Z) Company: Warner-Lambert Company
Articles: Prazepam steps IX and X
Merchandise: 2-amino-5-chlorobenzophenone
Factory: Holland, MI
Statement signed: June 21, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, November 20, 1985

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19 CFR Part 4

(T.D. 85-191)

Liquidated Damages Claims Against Bonded Carriers

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In FR Doc. 85-25007, published as T.D. 85-180, in the Federal Register on October 21, 1985 (50 FR 42516), § 18.8(e)(1), Customs Regulations (19 CFR 18.8(e)(1)), was extensively revised to reflect the terms of the 1975 Convention on International Road Transport (TIR) Carnets.

Subsequently, § 18.8(e)(1) was further amended in FR Doc. 85-28433, published as T.D. 85-191, in the Federal Register on November 29, 1985 (50 FR 49037). This document made minor changes to the third sentence of § 18.8(e)(1). However, it erroneously referred to the second sentence. Accordingly, on page 49039, in the second column, in the third numbered paragraph, the word "second" should be changed to "third".

Dated: March 25, 1986.

B. JAMES FRITZ,
Director,
Regulations Control and Disclosure Law Division.

[Published in the Federal Register, March 31, 1986 (51 FR 10825)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 85-2107)

WARNER BROTHERS, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

J. Joseph Bainton, of New York, New York, argued for appellant. With him on the brief were *Steven H. Reisberg* and *Joseph J. Iarocci,* Reboul, MacMurray, Hewitt, Maynard & Kristol, of counsel.

William E. Perry, Office of the General Counsel, of Washington, D.C., argued for appellee. With him on the brief were *Lyn M. Schlitt,* General Counsel and *Michael P. Mabile,* Assistant General Counsel.

Richard M. Cooper and *Mary G. Clark,* Williams & Connolly, of Washington, D.C., were on the brief for Amicus Curiae, Motion Picture Association of America, Inc.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85-2107)

WARNER BROTHERS, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE

(Decided March 20, 1986)

Before MARKEY, *Chief Judge,* SMITH and NIES, *Circuit Judges.*

NIES, *Circuit Judge.*

Warner Brothers, Inc. appeals from the final decision of the International Trade Commission (ITC) in investigation No. 337-TA-201, which declined to grant Warner's request for a temporary exclusion order (TEO) because Warner failed to prove that the domestic industry would suffer immediate and substantial harm in the absence of such relief. Because the ITC applied the correct legal standard, and its finding of no immediate and substantial harm is supported by substantial evidence, the decision of the ITC is affirmed.*

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* This appeal was originally decided in an unpublished opinion released January 10, 1986, and has now been reissued in published form.

OPINION

As a threshold matter in this appeal, the ITC argues that Warner has waived its right to challenge the immediate and substantial harm standard because it failed to file a petition for review of the ALJ's initial decision by the Commission. We do not agree. The government's argument on waiver hopelessly confuses the precedent dealing with requirements that a private litigant must first exhaust administrative remedies with the Commission's *sua sponte* right to restrict the disposition of a case to a single dispositive issue.

With respect to the latter, this court held in *Beloit Corp.* v. *Valmet Oy,* 742 F.2d 1421, 1423, 223 USPQ 193, 194 (Fed. Cir. 1984), *cert. denied,* 105 S. Ct. 2706 (1985):

> The Commission, on the other hand, is at perfect liberty to reach a "no violation" determination on a single dispositive issue. That approach may often save the Commission, the parties, and this court substantial unnecessary effort. Like many good things, that approach carries with it a risk—here the risk of a reversal, and a consequent need for the Commission to revisit one or more portions of the initial determination on which it had taken no position.

Whether or not a petition for review is filed, the ITC may limit resolution of a case to a single dispositive issue. It may not, however, parse that issue so finely that meaningful judicial review is precluded. In this case, the ITC in its notice of "nonreview" of the initial decision (ID) specifically adopted "that portion of the administrative law judge's ID finding that there is no immediate and substantial harm to the domestic industry." Although the ITC's statement appears to be directed to the factual finding of no immediate and substantial harm, it would make no sense for the ITC to treat that finding as dispositive were it not in agreement with the legal standard. Thus, a challenge to the legal propriety of the standard as well as to the factual satisfaction of that standard may be raised at this time.

With respect to a party's *waiver* of an issue, the precedent cited by the government has no applicability here. *Tong Seae Industries Co., Ltd.* v. *USITC,* 67 C.C.P.A. 160, 164 (1980) repeated the hornbook rule that a party may not raise issues on appeal "that were *never* raised below." *Astra-Sjuco A.B.* v. *USITC,* 629 F.2d 682 (CCPA 1980) was decided under the prior rules where the ALJ decision did not automatically become the decision of the Commission.

As we read the current regulations, 19 C.F.R. § 210.55(a)(2), if a party does file a petition for review of the ID, any issue not raised therein "will be deemed to have been abandoned." That rule obviously applies where a party files such a petition. However, there is no requirement that a party file a petition for review or risk

waiver of all adversely decided issues. On the contrary, as indicated in *Beloit, supra* at 1424, where Valmet filed no petition:

> Valmet obviously desires to argue before us the validity and injury issues as insurance against the possibility of our reversing the "no-infringement" finding adopted by the Commission. That desire, and the back-door appeal it would create, are premature. If this court affirms on "no-infringement", the litigation ends (absent grant of certiorari) favorably to Valmet. If this court reverses on that issue, and if on remand the Commission adopts the portions of the Initial Determination relating to the validity and injury issues, Valmet may appeal that decision to this court at that time.

Beloit clearly did not sanction a rule that a party waives appeal rights by failure to file a petition for review. Where the Commission limits the issues, *sua sponte,* a reversal on those issues will result in a remand. *Id.*

Regarding Warner's challenges to the ALJ's refusal to invoke a presumption of irreparable injury in copyright cases, this court has already spoken:

> [S]ection 337 does not function merely as the international extension of our patent, trademark and copyright laws * * *. Instead, section 337 has consistently been interpreted to contain a distinct injury requirement of independent proof.

Textron, Inc. v. *U.S. International Trade Commission,* 753 F.2d 1019, 1028, 224 USPQ 625, 631 (Fed. Cir. 1985) (citation omitted). This is particularly important where, as here, temporary relief is sought. The ALJ properly declined to adopt a relaxed proof requirement as might exist when seeking injunctive relief under the copyright statute. The two statutes protect different rights, and similarity of two statutory schemes in one respect does not warrant eradication of purposefully designed differences in another. Finally, the Commission's finding of no immediate and substantial harm to Warner is reasonable on the evidentiary record. Thus, we hold that the finding is supported by substantial evidence. *See SSIH Equipment S.A.* v. *USITC,* 718 F.2d 365, 381–83, 218 USPQ 678, 692–93 (Fed. Cir. 1983) (Nies, J., supplemental opinion).

For the foregoing reasons, the ITC's refusal to issue a temporary exclusion order is affirmed.

AFFIRMED

(Appeal No. 85-2282)

VISCOFAN, S.A., PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, UNION CARBIDE CORP., AND TEEPAK, INC., RESPONDENTS

Thomas V. Heyman, Dewey, Ballantine, Bushby, Palmer & Wood, of New York, New York, argued for appellant. With him on the brief were *Saul P. Morgenstern*

and *Claire Ann Koegler. Steven H. Bazerman* and *Julius Rabinowitz,* Kuhn, Muller & Bazerman, of New York, New York, of counsel.

Judith M. Czako, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee International Trade Commission. With her on the brief were *Lyn M. Schlitt,* General Counsel and *Michael P. Mabile,* Assistant General Counsel.

H. Blair White, P.C., Sidley & Austin, of Chicago, Illinois, argued for appellee Union Carbide. With him on the brief were *David T. Pritikin, Rex E. Lee, Richard E. Young,* Sidley & Austin, of Washington, D.C., *C. Frederick Leydig, Homer J. Schneider, Charles S. Oslakovic, Mark E. Phelps,* Leydig, Voit & Mayer, Ltd., of Chicago, Illinois and *Thomas I. O'Brien, Clyde V. Erwin,* Union Carbide Corp., Danbury, Connecticut.

Appealed from: U.S. International Trade Commission.

(Appeal No. 85-2282)

VISCOFAN, S.A., PETITIONER *v.* U.S. INTERNATIONAL TRADE COMMISSION, UNION CARBIDE CORP., AND TEEPAK, INC., RESPONDENTS

(Decided March 18, 1986)

Before FRIEDMAN, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and BISSELL, *Circuit Judge.*

FRIEDMAN, *Circuit Judge.*

This petition to review challenges (1) aspects of a remedial order the United States International Trade Commission (Commission) entered in a proceeding under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1982), and 19 U.S.C. §1337a (1982), and (2) the Commission's refusal to declassify confidential information that had been submitted during the Commission proceedings pursuant to a protective order. We affirm the challenged portions of the remedial order and dismiss the challenge to the refusal to declassify as an issue over which we have no jurisdiction.

I

A. In response to a complaint filed by respondent, Union Carbide Corporation (Carbide), the Commission in October 1983 initiated an investigation to determine whether the petitioner, Viscofan, S.A. (Viscofan), had committed unfair methods of competition and unfair acts in violation of section 337. The alleged unfair practices consisted of the importation and selling by Viscofan, a Spanish corporation, of certain skinless sausage casings. Carbide's complaint to the Commission alleged that Viscofan had manufactured the casings by processes that (1) violated two of Carbide's patents, and (2) involved trade secrets of Carbide that Viscofan had misappropriated. Carbide is one of the two major American manufacturers and sellers of skinless sausage casings.

The Commission consolidated this investigation with another investigation it previously had instituted, involving similar claims of patent infringement (but no claim of misappropriation of trade se-

crets) made by the other major American manufacturer and seller of skinless sausage casings, Teepak, Inc. (Teepak). No issues relating to the Teepak investigation are involved in the case before us.

In its opinion, the Commission stated that the

> general manufacturing process for skinless sausage casings as practiced by each of the parties to these investigations involves three distinct manufacturing operations: (1) chemical preparation, which involves the manufacture of viscose from natural cellulose fibers; (2) simultaneous regeneration of the cellulose and continuous formation of accurately-sized cellulose tubes in extrusion machines, including drying the extruded casing under carefully controlled conditions and winding it onto reels of semi-finished material called "flat stock;" and (3) shirring, which is a finishing operation during which lengths of flat stock are finely pleated and compressed into short, self-supporting, tubular sticks. [Footnote omitted.]

The Commission further stated:

> Meatpackers use skinless sausage casings to make sausage products by sliding a stick of shirred casing over the stuffing tube or horn of a sausage stuffing machine and pumping a meat emulsion into the stick as it de-shirrs, or extends. The meat-filled casing is twisted at intervals to define individual sausages or links. The long chain of links produced is cooked, after which the casing is normally removed, and the resulting product is sold as "skinless" sausages or frankfurters. [Footnote omitted.]

Following a hearing, the administrative law judge in July 1984 rendered a 363-page initial decision holding that Viscofan had violated section 337 and 19 U.S.C. § 1337a by (1) infringing a valid patent owned by Teepak, and (2) misappropriating Carbide's trade secrets. He determined that Viscofan had misappropriated six of those trade secrets.

The Commission stated:

> The ALJ found all the other elements of a violation of section 337 to exist in each investigation. The ALJ also determined that respondent Viscofan had failed to prove its affirmative defenses of patent misuse and unclean hands, wherein it alleged that complainants Teepak and Union Carbide had conspired to monopolize the manufacture of skinless sausage casings in the United States by means of illegal patent pooling, cross-licensing, price-fixing, and predatory behavior.

The Commission declined to review the initial decision, which thereby became the agency's final decision. The Commission then considered the relief stage of the proceedings and received submissions on the relief and public interest aspects of the case from the parties and others.

The Commission's final order, which became effective in January 1985, excluded "from entry into the United States for the remain-

ing term of the patent" "[s]mall caliber sausage casings manufactured abroad in accordance with the process disclosed" in the Teepak patent. It provided that persons desiring to import such casings "may petition the Commission to institute" further proceedings to determine whether the casings sought to be imported fell within the bar of the preceding paragraph.

Paragraph 3 of the Commission's order, the validity of which is a major issue before us, "excluded from entry into the United States for * * * ten (10) years from the date of this order" "[s]mall caliber cellulose sausage casings manufactured by Viscofan" or any affiliated company or related business entity.

The Commission explained at considerable length the reasons that led it to adopt paragraph 3, which we discuss in some detail in part II, *infra*. Here we merely summarize the Commission's reasoning.

The Commission rejected Viscofan's contention that "a cease and desist order is the only appropriate remedy in a trade secrets investigation * * *." It stated that because there was no way in which it could determine from the finished casings whether they had been manufactured by processes using the misappropriated trade secrets, and because it could not police Viscofan's manufacturing operations in Spain to determine whether the misappropriated secrets were being used, an exclusion order was "the only remedy that promises to be reasonably effective."

In setting the period of exclusion at 10 years, the Commission stated that the normal period of relief in a trade secrets misappropriation case is the time it would take the misappropriator "independently to develop the technology using lawful means." It rejected Viscofan's contention that the proper basis for ascertaining that period was the time it would have taken Viscofan to discover each trade secret separately, because "this approach ignores the interrelationships between and among the trade secrets and technology involved" and the fact that Viscofan had misappropriated six such interrelated trade secrets. The Commission concluded that it should "consider a single independent development time" for the six misappropriated trade secrets together. On the basis of the evidence Carbide submitted and Carbide's arguments regarding the time necessary independently to develop an integrated manufacturing process without the benefit of the six misappropriated trade secrets, the Commission concluded that its "remedial order should apply for a period of ten years."

Finally, the Commission concluded that the 10-year period of exclusion should run from the date of its order rather than, as Viscofan argued, from the date of the misappropriation of the trade secrets. It stated: "The facts of this investigation, particularly the fact that the misappropriation involved an actual theft of trade secrets, support the conclusion that Viscofan should not be credited

with the time between the misappropriation and the entry of the Commission's remedial order."

B. During the Commission proceedings, Carbide submitted to the Commission certain material relating to the circumstances surrounding the misappropriation of its trade secrets. This material was submitted as "confidential business information" pursuant to a protective order of the administrative law judge that provided for confidential treatment of such information.

Later in the proceedings Viscofan moved to redesignate this material as nonconfidential and thus make it a part of the public record in the case. Viscofan stated that it wanted to use this information in connection with a foreign court proceeding. The administrative law judge denied the motion.

Although the Commission denied review of the administrative law judge's initial decision, it granted review of his denial of Viscofan's motion to redesignate the material as nonconfidential. The Commission affirmed the administrative law judge's ruling. It stated that "[t]he proper standard of review on this issue is whether the ALJ abused his discretion in denying respondent Viscofan's motion" and concluded that "[t]he ALJ's decision was reasonable and not an abuse of discretion * * * ."

The Commission stated: "Evidence in a section 337 investigation is gathered solely for the purposes of that proceeding. The statute and rules do not provide any support for the notion that information should be declassified because it is sought for use in a foreign court proceeding." It pointed out that the material involved " 'expenditures' of Union Carbide, and thus qualify as confidential business information within the literal terms of the rules and ALJ's protective order. Nothing in rule 201.6 as it existed when the protective order in this investigation issued, and the subject information was produced, limited the type of 'expenditure' which would qualify as confidential."

II

Section 337 requires the Commission, upon determining a violation of the section, either to "direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States" (subsection (d)) or to direct any person violating the section "to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued." (Subsection (f)(1)).

Under this provision the Commission has broad discretion in selecting the form, scope and extent of the remedy, and judicial review of its choice of remedy necessarily is limited. *See Canadian*

Tarpoly Co. v. *United States International Trade Commission,* 640 F.2d 1322, 1326, 209 USPQ 33, 35–36 (CCPA 1981); *Sealed Air Corp.* v. *United States International Trade Commission,* 645 F.2d 976, 989, 209 USPQ 469, 480–81 (CCPA 1981). As the Supreme Court stated in the leading case of *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608 (1946), in words that are equally applicable to this case:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Id. at 611–13 (footnote omitted). *See also Sealed Air Corp., supra,* ("it is not the function of a court to substitute a different remedy of its own design for that chosen by the ITC, or to substitute its view of the public interest for that of the ITC"). 645 F.2d at 989 (footnote omitted).

We evaluate Viscofan's challenges to paragraph 3 of the Commission's order, in the light of these principles.

As noted, paragraph 3 excluded from entry into the United States for 10 years from the date of the order skinless sausage casings manufactured by Viscofan or an affiliated company. Viscofan contends that this provision is (A) overly broad because it is not limited to sausage casings manufactured by use of the specific trade secrets found to have been misappropriated, and (B) excessively long in duration because the 10-year period of exclusion (1) improperly was based upon the time it would have taken Viscofan independently to develop the entire sausage casing manufacturing process rather than the time it would have taken Viscofan independently to discover separately each of the misappropriated trade secrets, and (2) should have run not from the date of the Commission's order but from the date of the misappropriation.

A. 1. In rejecting Viscofan's contention that the only appropriate remedy against the misappropriation of trade secrets would be a cease and desist order barring Viscofan from importing sausage casings made by a process that utilized the particular trade secrets Viscofan had misappropriated, the Commission justifiably concluded that such an order would not effectively correct the violations found.

The Commission pointed out that "there is no means by which we can determine from the casings whether they were manufac-

tured by a process which incorporates the misappropriated trade secrets." It noted that "Viscofan has represented that it can put into operation a separate production line, which does not incorporate the misappropriated trade secrets, use only that line for U.S. production, certify each shipment, and open its plant to inspection by Commission-appointed experts to ensure that it is not using the misappropriated trade secrets." The Commission concluded, however, that this would be an unsatisfactory and impossible method for insuring compliance with a cease and desist order because

> on the record in this investigation the Commission cannot confidently base the remedy on Viscofan's assurances, and the Commission has neither the jurisdiction nor means to conduct plant inspections in Spain. Therefore, exclusion is the only remedy which promises to be reasonably effective.

Moreover, as the Commission also pointed out, Viscofan's position not only would not provide a practical, effective method for insuring that the sausage casings Viscofan imported would not be made by processes utilizing the misappropriated trade secrets, but also "ignores the interrelationships between and among the trade secrets and technology involved, as well as the ALJ's conclusion that six specific trade secrets were found to have been misappropriated * * *. The trade secret aspects are not independent of the non-trade-secret aspects of the technology involved."

Considering all the circumstances, we cannot say that the Commission had not "made an allowable judgment in its choice of the remedy" in adopting a 10-year exclusion order rather than a cease and desist order, or that "the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel, supra,* 32 U.S. at 612–13.

Viscofan argues that in trade secret litigation, a normal remedial order bars the misappropriator from using only the particular secrets he has taken. The cases upon which it relies, however, all involved private litigation and did not implicate the important public interest considerations implicated in a Commission proceeding under section 337. In the language of the statute, that proceeding is designed to protect American industry from "[u]nfair methods of competition and unfair acts in the importation of articles into [or their sale in] the United States * * * the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such in industry, or to restrain or monopolize trade and commerce in the United States * * *.

2. Viscofan further argues that it is entitled to petition the Commission to show that sausage casings it wants to import have been made by processes that do not utilize misappropriated trade secrets. Pointing to the provision in the portion of the order excluding goods made by processes that infringe the Teepak patent that permits Viscofan to demonstrate to the Commission that particular

processes do not infringe, Viscofan apparently believes that the lack of a similar provison in the trade secrets portion of the order bars it from seeking such relief from the Commission with respect to trade secrets.

At oral agrument, however, Commission counsel stated that Viscofan could seek such relief pursuant to section 211.57 of the Commission's rule. That section provides that "[w]henever any person believes that changed conditions of fact * * * require that a final Commission action be modified or set aside, in whole or in part, such person may file with the Commission a motion requesting such relief." 19 C.F.R. § 211.57(a) (1985). Moreover, paragraph 6 of the order provides: "The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57)."

There is nothing in the Commission's order that precludes Viscofan from filing with the Commission a petition for an exception to paragraph 3 of the order to permit Viscofan to import sausage casings manufactured by processes that do not involve or depend upon the trade secrets Viscofan misappropriated. If Viscofan can demonstrate to the Commission's satisfaction that it has developed and will continue to use manufacturing processes totally untainted by the trade secrets it misappropriated, there is no reason to think that the Commission would not permit Viscofan to import the product.

B. 1. In setting the length of the order at 10 years, the Commission correctly recognized that "the duration of relief in a case of misappropriation of trade secrets should be the period of time it would have taken respondent independently to develop the technology using lawful means." The Commission concluded that in the circumstances of this case the basis for determining the development time was the time it would have taken Viscofan to create the manufacturing processes involving the misappropriated trade secrets and not, as Viscofan urged, the time it would have required Viscofan to discover each particular trade secret independently and without regard to the total process. Here, as in the case of the Commission's decision to adopt an exclusion rather than a cease and desist order, we cannot say the Commission abused its discretion or that this aspect of the order is not supported by substantial evidence.

Viscofan misappropriated six specific trade secrets of Carbide. The Commission stated that "to issue a remedial order based on the time necessary to develop each such aspect would ignore the fact that Viscofan had the benefit of the entire machine, system, or set of standards, including non-trade-secret elements, which it had misappropriated, from which to work in developing its 'new technology.' The trade secret aspects are not independent of the non-trade-secret aspects of the technology involved." The agency justifiably concluded "to consider a single independent development time

for the six trade secrets found by the ALJ to have been misappropriated."

There was conflicting evidence regarding the time it would have required Viscofan independently to develop its own technology without the benefit of the misappropriated trade secrets. Viscofan's witnesses viewed the independent development of each of the six misappropriated trade secrets as relatively simple tasks that could have been done in a short period. Carbide, on the other hand, based upon its witnesses' testimony, suggested that "a shirring technology could be developed in between nine to twelve years, and an extrusion technology could be developed in between twelve to fifteen years."

The Commission's conclusion that it would have taken Viscofan 10 years independently to develop the technology is supported by the evidence in the record, and we have no basis for rejecting the Commission's determination that that period is the appropriate duration of the order. As the Commission explained: "To now conclude that Viscofan could have developed alternative technology for the misappropriated trade secrets in a relatively short time would be to give it the benefit of having had the misappropriated trade secrets for a period of years as a basis from which to work. We believe that this would be a wholly inequitable result."

Viscofan argues, however, that *Syntex Ophthalmics, Inc.* v. *Novicky,* 745 F.2d 1423, 223 USPQ 695 (Fed. Cir. 1984), *vacated,* 105 S.Ct. 1740 (1985), *reinstated on remand,* No. 84-838 (Fed. Cir. July 18, 1985), compels a different conclusion. In *Syntex,* this court stated that under governing Illinois law, "an injunction in a trade secret case must be limited to the appropriate length of time necessary for the defendant to duplicate the trade secret by lawful means." 745 F.2d at 1435, 223 USPQ at 704 (citations omitted). That is substantially the same standard the Commission applied here. *Syntex* was a private suit, and the opinion there did not address the question here, which is whether the necessary development time was that required to develop the complete processes in which the misappropriated trade secrets were used rather than the time necessary to discover each trade secret independently.

In *Syntex,* the court significantly reduced the duration of the 20-year injunction the district court entered. It did so, however, because it concluded that the only evidence upon which the district court based that injunction—testimony that more than 20 man-years were spent developing the misappropriated trade secret—was insufficient to support the injunction, primarily because the 20 man-years actually had been expended by several people during only two years. *Syntex* does not support Viscofan's position that the duration of the exclusion order should be based upon the time required to develop each trade secret separately.

2. Viscofan further contends that even if a 10-year order is appropriate, its starting date should have been the date of the misap-

propriation, which Viscofan contends was not later than January 1979, rather than the date on which the Commission's order became final in January 1985. Viscofan relies again on *Syntex,* this time on the holding there that the maximum permissible duration of the injunction was eight years from the misappropriation or four years from the preliminary injunction.

In determining that the 10-year exclusion should run from the date of the Commission's order, the Commission pointed out that in its only previous ruling on this issue, the period of exclusion had so run. *In re Certain Apparatus for the Continuous Production of Copper Rod,* 206 USPQ 138 (U.S.I.T.C. 1979). The Commission concluded: "The facts of this investigation, particularly the fact that the misappropriation involved an actual theft of trade secrets, support the conclusion that Viscofan should not be credited with the time between the misappropriation and the entry of the Commission's remedial order."

The appropriate starting date for an exclusion order based upon misappropriation of trade secrets necessarily depends on the facts of the particular case. In *Syntex* the district court's injunction ran for 20 years from the date of misappropriation. The fact that this court, in reducing the length of the injunction in *Syntex,* indicated that the maximum permissible injunction would be eight years from misappropriation (or four years from the date of the preliminary injunction), does not establish that the Commission abused its discretion in this case in making the effective date of its 10-year exclusion the date of its order.

III

Viscofan challenges the Commission's affirmance of the administrative law judge's refusal to declassify certain material relating to the misappropriation of the trade secrets that had been submitted to the Commission as confidential business records pursuant to a protective order of the administrative law judge. We do not reach the merits of that issue, since we agree with the Commission that we have no jurisdiction to review the refusal to declassify as part of this review proceeding.

Under 28 U.S.C. § 1295(a)(6) (1982), this court has exclusive jurisdiction

> to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 * * *.

Congress has specifically defined the "final determinations * * * under section 337 * * * " which this court may review:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination to the United States Court of Appeals for the Federal Circuit * * *

19 U.S.C. § 1337(c) (1982). Commission determinations under subsections (d), (e), and (f) are those excluding articles from entry, excluding articles from entry during an investigation except under bond, and cease and desist orders, respectively. The Commission's refusal to declassify the confidential material, however, was not "a determination" under any of those subsections.

The refusal to declassify was unrelated to the propriety of the exclusion order, which we have jurisdiction to review under subsection (d). An affirmance or reversal of the refusal to declassify would not and could not in any way affect the validity of the exclusion order. Viscofan does not contend to the contrary. It sought to make the confidential information public only because it wanted to use it in a foreign court proceeding, and not because a favorable ruling on that issue would aid its challenge to the exclusion order. The Commission's refusal to declassify the confidential business information is not ancillary to our review of Viscofan's challenges to paragraph 3 of the Commission's order. *Cf. Refractarios Monterrey, S.A.* v. *Ferro Corp.*, 606 F.2d 966, 203 USPQ 568 (CCPA 1979), *cert. denied*, 445 U.S. 943, 205 USPQ 488 (1980. *Duracell, Inc.* v. *United States International Trade Commission*, —— F.2d ——, 228 USPQ 187 (Fed. Cir. 1985).

We express no view on what court, if any, would have jurisdiction to review the Commission's refusal to declassify. We hold only that under our narrow jurisdiction to review Commission determinations, we do not have that authority.

CONCLUSION

Paragraph 3 of the Commission's order is affirmed. Insofar as the petition to review challenges the Commission's refusal to declassify confidential material, it is dismissed.

AFFIRMED IN PART AND DISMISSED IN PART

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul R. Rao
Morgan Ford
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-26)

UNITED STEELWORKERS OF AMERICA AND ITS LOCALS 68, 7508, AND 196, PLAINTIFFS *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, DEFENDANT

Court No. 83-7-00944

Before RE, *Chief Judge.*

ON PLAINTIFFS' MOTION FOR REVIEW OF ADMINISTRATIVE DETERMINATION UPON AGENCY RECORD

Plaintiffs, on behalf of former employees of Duval Corporation, challenge the Secretary of Labor's denial of certification of eligibility for benefits under the trade adjustment assistance program.

Held: The Secretary's determination that increases of imports did not contribute importantly to the workers' separation from employment is not supported by substantial evidence contained in the record, and is not in accordance with law. Hence, the determination of the Secretary is vacated, and the case is remanded.

[Administrative determination of the Secretary of Labor denying certification of worker adjustment assistance benefits vacated; case remanded.]

(Dated March 12, 1986)

Bredhoff & Kaiser (*James D. Holzhauer,* on the motion), for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff,* on the motion), for the defendant.

RE, *Chief Judge:* In this action, plaintiffs, on behalf of former employees of the Duval Corporation, seek review of a final determination by the Secretary of Labor which denied certification of eligibility for benefits under the worker adjustment assistance program of the Trade Act of 1974, tit. II, §§ 221-249, 284, 19 U.S.C. §§ 2271-2321, 2395 (1982 & Supp. I 1983). Specifically, the Secretary found that the workers were not eligible for assistance because increases of imports did not contribute importantly to their separation from employment.

After reviewing the administrative record and the arguments of the parties, the Court holds that the determination of the Secretary is not supported by substantial evidence, and is not in accord-

ance with law. Therefore, the case is remanded to the Secretary for further consideration not inconsistent with this opinion.

On July 6, 1982, July 28, 1982, and August 5, 1982, plaintiffs, on behalf of employees at three mining operations of Duval Corporation, filed petitions for certification of eligibility to apply for trade adjustment assistance benefits. Pursuant to section 221(a) of the Trade Act of 1974, 19 U.S.C. § 2271(a), the Office of Trade Adjustment Assistance (OTAA) of the Department of Labor [1] published notices in the Federal Register stating that it had received the petitions and had instituted an investigation into their validity. 47 Fed. Reg. 31,450, 36,484 (1982).

Section 222 of the Trade Act requires the Secretary to certify a group of workers as eligible to apply for trade adjustment assistance benefits if it is determined:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Trade Act of 1974 § 222, 19 U.S.C. § 2272 (Supp. I 1983).

Plaintiffs contend that increased imports of copper contributed importantly to the decline of sales and production by Duval Corporation, and to the workers' separation from employment. The Secretary denied plaintiffs' petition on the grounds that it failed to satisfy the increased imports requirement of section 222. 19 U.S.C. § 2272(c).

The Secretary of Labor's Determination

The OTAA's investigation disclosed that Duval Corporation, a wholly owned subsidiary of Pennzoil Company, owns three mines in Arizona, which are known as Mineral Park, Sierrita, and Esperanza. On December 15, 1981, all three operations ceased production, and approximately 2,000 workers were separated from employment. Some workers were retained at each site and, on April 1, 1982, the Sierrita Mine resumed production at 40 percent of capacity.

The workers at all three mines were found to be engaged in both the mining of copper ore and the production of copper concentrate. Copper ore, concentrate, precipitate, and matte, are types of copper

[1] The Director of the Office of Trade Adjustment Assistance has been delegated the responsibility for investigating adjustment assistance eligibility. 29 CFR § 90.2 (1985).

which are smelted or converted into blister copper. The record shows that statistics for the domestic production of copper ore, concentrate, precipitate, and matte are grouped under the heading "copper ore." Statistics are also provided for the later stages of processing, under the headings blister copper and refined copper. Most blister copper is cast into copper anodes for electrolytic refining. Refined copper is cast into wirebar, ingot, or other shapes for later fabrication. Duval processed between 20 and 25 percent of its copper concentrate into blister copper. All of the blister copper and the remainder of the copper concentrate produced by Duval was refined by outside companies on a toll basis.

The OTAA performed a trade and industry analysis to ascertain the effect of imports on the domestic copper industry. The investigation disclosed that imports of copper ore in 1980 increased 70.6 percent over 1979. In 1981, imports of copper ore decreased 20.6 percent to a level representing 2.7 percent of domestic production. During the first three quarters of 1982, imports of copper ore increased 338.5 percent. Imports of blister copper decreased 70.3 percent in 1979, from a 5-year high attained in 1978. In 1980, however, imports rose 88.8 percent. Imports of blister copper decreased in 1981 by 35.5 percent, and increased by 229.2 percent in 1982. The investigation also disclosed that imports of refined copper increased 107 percent in 1980 from 1979. Imports of refined copper declined by 21.8 percent in 1981 and 23.7 percent in 1982. The Secretary noted that an industry-wide strike of mine workers affected the total level of copper imports in 1980.

Based on these findings, the Secretary concluded that the workers should be denied certification because, "U.S. imports of refined copper declined both absolutely and relative to domestic production in 1981 compared to 1980 and in the January through September 1982 period compared to the same period in 1981." *See* 48 Fed. Reg. 12,006 (1983).

Thereafter, plaintiffs applied for reconsideration of the administrative determination. On April 25, 1983, the Secretary issued a notice of negative determination in response to plaintiffs' application. 48 Fed. Reg. 28,524 (1983). Subsequently, plaintiffs commenced this action seeking judicial review of the Secretary's final negative determination.

On April 30, 1984, the Court granted the Secretary's motion for a voluntary remand in order to allow the Secretary to supplement the record with a survey of Duval's customers. After reconsideration, on June 29, 1984, the Secretary issued a "further determination," which stated that the "[r]esults of the customer survey [confirmed] the Department's original determination that imports did not contribute importantly to * * * worker separations at the Duval Corporation in 1982." Plaintiffs then requested this Court to set aside the Secretary's determination.

Discussion

Section 284 of the Trade Act of 1974 empowers the Court of International Trade to review a determination by the Secretary of Labor that denies certification of eligibility for adjustment assistance to assure that the determination is supported by substantial evidence and is in accordance with law. 19 U.S.C. § 2395(c); *see Woodrum* v. *Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd,* 737 F.2d 1575 (Fed. Cir. 1984). The findings of fact by the Secretary are conclusive if supported by substantial evidence. Trade Act of 1974, § 284(b), 19 U.S.C. § 2395(b) (1982). Moreover, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary or capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union* v. *Marshall,* 584 F.2d 390, 396 n.26 (D.C. Cir. 1978), *quoted in ILWU Local 142* v. *Donovan,* 9 CIT ——, Slip Op. 85–127, at 9 (Dec. 11, 1985); *see* 19 U.S.C. § 2273(c).

The plaintiffs urge that the Secretary's negative determination of eligibility should be set aside. First, they contend that the Secretary improperly used 1982 as a comparison year, because the workers were separated from employment in 1981, not 1982. Second, plaintiffs allege that it was improper for the Secretary to consider import statistics for the third quarter of 1982, a time period subsequent to the separation of the workers. Third, they maintain that the Secretary "erred as a matter of law in limiting his focus to refined copper," and that the Secretary should also have considered imports of copper ore and blister copper. The plaintiffs also contend, for the same reasons, that the consumer survey conducted by the Secretary did not accurately reflect the effect of imports on Duval's sales.

It is well established that, in the absence of a valid reason to consider a different time period, the Secretary determines whether there has been an increase of imports by a comparison of the year of separation with the immediate preceding year. *See, e.g., Paden* v. *United States Dep't of Labor,* 562 F.2d 470, 473 (7th Cir. 1977); *Katunich* v. *Donovan,* 8 CIT 157, 594 F. Supp. 744, 752 (1984). In this case, the Secretary found that there were "major layoffs" in both 1981 and 1982, and, therefore, 1982 was a base year for comparison. Plaintiffs contend that, since a significant number of workers were separated from employment in 1981, by using 1982 as a base year, the Secretary has considered an irrelevant and erroneous time period. Thus, the question presented in this case is whether the Secretary's finding that 1982, in addition to 1981, is a year of separation is supported by substantial evidence in the record, and is in accordance with law.

The Secretary found that, at all three mines, major layoffs occurred in December 1981 and March, May, June, and July 1982. Duval separated approximately 2,000 workers, over 68 percent of its total work force, when the mines ceased production in Decem-

ber 1981. This represented an 88 percent decline in the average number of workers employed at the Mineral Park mines, a 54 percent decline at the Sierrita mine, and an 83 percent decline at the Esperanza mine. Although additional separations occurred in 1982, the number of workers affected was significantly less than in 1981. Plaintiffs contend that since the significant majority of workers were separated from employment in 1981, the Secretary should not have considered whether imports increased in 1982.

The Secretary has promulgated regulations which provide definitions relating to trade adjustments petitions. These regulations provide, in part:

> "Layoff" means a suspension from pay status for lack of work initiated by the employer and expected to last for no less than seven (7) consecutive calendar days * * *.
>
> "Significant number or proportion of the workers" means that:
>
> (a) In most cases the total or partial separations, or both, in a firm . . . are the equivalent to a total unemployment of five percent (5 percent) of the workers or 50 workers, whichever is less * * *.

29 C.F.R. § 90.2 (1985).

Surely, the 2,000 workers who were separated in December 1981 and who filed for adjustment assistance constitute a "significant number or proportion of the workers," as that phrase is defined by the Secretary. *See* 29 C.F.R. § 90.2 (1985). However, the record shows that the workers separated in 1982 also constitute a significant number of workers. From the record, the Court can reasonably discern that the Secretary's determination was based on an analysis of both 1981 and 1982. The workers were denied certification because the Secretary found that imports declined in both 1981 and 1982. On these facts the Court cannot say that the Secretary's choice "is not the product of a reasoned analysis evident in the administrative record." *See International Union* v. *Marshall,* 584 F.2d 390, 396 (D.C. Cir. 1978). Hence, in view of the regulations promulgated by the Secretary, and the evidence contained in the record, the Court holds that the Secretary's decision to use 1982 as a base year is supported by substantial evidence in the record, and is in accordance with law.

Plaintiffs also contend that the Secretary should not have considered import statistics for the third quarter of 1982. Plaintiffs claim that this data is irrelevant to their petition because it relates to a time period subsequent to the workers' separation from employment. In addition, plaintiffs contend that the Secretary's reliance on these statistics is inconsistent with his certification of similarly situated mine workers at Kennecott Minerals Company, who were also represented by the United Steelworkers Union. The Secretary explained that the Duval workers were denied certification because data for the third quarter of 1982 became available, and the Ken-

necott investigation was based on data for the first 6 months of 1982. *See* 48 Fed. Reg. at 28,524. The Secretary did not explain, however, how the decline in imports *subsequent* to the Duval workers' separation was "likely to affect employment in the year of separation." *Paden,* 562 F.2d at 473. Hence, the Court holds that the case must be remanded so that the Secretary may articulate with reasonable clarity his reasons for considering imports after the separation of the workers. *See UAW* v. *Marshall,* 584 F.2d 390, 397 (D.C. Cir. 1978); *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971); *see also Camp* v. *Pitts,* 411 U.S. 138, 143 (1973) (court may require additional explanation of reasons for agency decision).

Plaintiffs also contend that the Secretary improperly restricted his focus to imports of refined copper. The Secretary, however, determined that "the proper focus of competitive impact" should be on refined copper, since that was the product most "like or directly competitive with" the articles produced by Duval.

In *United Shoe Workers* v. *Bedell,* 506 F.2d 174 (D.C. Cir. 1974), the United States Court of Appeals for the District of Columbia Circuit held that component parts of an article are not "like" the imported articles which incorporate them. *Id.* at 177–78. The court also noted that the parties did not contend that the term "directly competitive" applied to the domestic manufacturer of component parts. *Id.* at 178 n.13. Moreover, the *United Shoe Workers* court recognized that the terms "like" and "directly competitive" are not synonymous or explanatory of one another. *Id.* at 186 n.77; *see* S. Rep. No. 1298, 93d Cong., 2d Sess. 121, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7265. The court distinguished the term "like" from the term "directly competitive" by noting that "many products can be directly competitive without having identical or nearly identical physical characteristics." 506 F.2d at 185.

In the *United Shoe Workers* case, the court stated that Congress had "expressly redefined 'directly competitive' in the Trade Expansion Act to cover items that were in different stages of processing." 506 F.2d at 186; *see* Trade Expansion Act of 1962 § 405(4), 19 U.S.C. § 1806(4) (1970) (current version at 19 U.S.C. § 2481(5)). The legislative history of the Trade Act of 1974 indicates that the term "like or directly competitive" was used in the same context as in the Trade Expansion Act of 1962. S. Rep. No. 1298, 93d Cong., 2d Sess. 121, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7265; *see Morristown Magnavox Former Employees* v. *Marshall,* 671 F.2d 194, 198 (6th Cir.), *cert. denied sub nom.* 459 U.S. 1041 (1982). The statutory definition of "directly competive' provides:

> (5) An imported article is "directly competitive with" a domestic article at an earlier or later stage of processing, and a domestic article is "directly competitive with" an imported article at an earlier or later stage of processing, if the importation of the article has an economic effect on producers of the

> domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article. For purposes of this paragraph, the unprocessed article is at an earlier stage of processing.

19 U.S.C. § 2481(5) (1982); *see* 29 C.F.R. § 90.2 (1985).

The legislative history to the Trade Expansion Act provides examples of the expanded definition of directly competitive:

> Under this provision, an imported article may be considered "directly competitive with" a domestic article * * * if the one is at an earlier or later stage of processing than the other, or if one is a processed and the other an unprocessed form of the same article, and if the economic effect of importation of articles is in the same stage of processing as the domestic article.
>
> The term "earlier or later stage of processing" contemplates that the article remains substantially the same during such stages of processing, and is not wholly transformed into a different article. Thus, for example, zinc oxide would be zinc ore in a later stage of processing since it can be processed directly from zinc ore. For the same reason, a raw cherry would be a glace cherry in an earlier stage of processing, and the same is true of a live lamb and dressed lamb meat * * *.

H.R. Rep. No. 1818, 87th Cong., 2d Sess. 24 (1962); *see United Shoe Workers,* 506 F.2d at 186 n.80.

Thus, in the context of petitions filed by workers who mine ore, it is appropriate for the Secretary to consider the effects of imported ore or "the more refined imported product." *See* Bratt, *Issues in Worker Certification and Questions of Future Direction in the Trade Adjustment Assistance Program,* 14 Law & Pol'y Int'l Bus. 819, 848 (1982). The cases cited by the defendant in support of the Secretary's determination are inapposite because they all involve component parts rather than articles in earlier or later stages of processing.

In this case, the Secretary limited his focus to imports of refined copper because "neither copper ore nor copper concentrate was marketed to outside customers." 48 Fed. Reg. 28,524 (1983). The statute, however, contemplates that imported articles which are not "like" the product produced by the domestic firm may nevertheless be "directly competitive with" domestic articles. Indeed, plaintiffs contend that there is "considerable cross-elasticity of demand between refined copper and other forms of copper." By focusing only on the product ultimately marketed by the workers' firm, the Secretary has, in effect, limited the scope of the statutorily defined words "directly competitive." Hence, the Court holds that the Secretary has improperly restricted his focus to articles marketed by Duval, rather than articles like or directly competitive with articles produced by Duval. Therefore, the Secretary's determination is not in accordance with law, and is vacated.

Conclusion

In light of the facts contained in the administrative record, the statute, and relevant case law, it is the holding of the Court that the Secretary of Labor's denial of certification is not supported by substantial evidence, and is not in accordance with law.

Accordingly, the determination of the Secretary of Labor is vacated, and the case is remanded to the Secretary for a redetermination of the certification of eligibility for adjustment assistance. Since the Secretary may wish to take additional evidence on matters which relate to the workers' petition, the Court notes that "the Secretary's latitude on remand extends to the full scope of his function under the Act. It is within his discretion to make a new determination, with new findings and reasons." *International Union* v. *Marshall,* 584 F.2d 390, 396 (D.C. Cir. 1978). Finally, it is ordered that the Secretary shall certify the record and report to the Court the results of the further proceedings within 60 days from the date of the entry of this opinion and order.

(Slip Op. 86-27)

NISSHO-IWAI AMERICAN CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 80-4-00637

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Bridge Sections

[Judgment for the defendant.]

(Decided March 12, 1986)

Stein Shostak Shostak & O'Hara (James F. O'Hara), for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commerical Litigation Branch *(Barbara M. Epstein),* for the defendant.

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain parts and accessories of unassembled bridges or bridge sections imported from Japan.

The merchandise was entered at the port of Anchorage, Alaska, and was classified by the Customs Service under item 652.98 of the Tariff Schedules of the United States (TSUS), a "basket" provision for bridges, bridge sections, and other structures and parts of structures of base metal. Hence, the merchandise was assessed with duty of 9.5 per centum ad valorem.

Plaintiff protests this classification, and contends that the merchandise is properly classifiable under item 652.96, TSUS, as "columns, pillars, posts, beams, girders and similar structural units," made in part of alloy iron or steel, dutiable at 5.5 per centum ad valorem.

Since resolution of the classification issue requires analysis of the tariff items relating to the superior heading, it is helpful to set forth the tariff provisions relating to these base metal structures as of the date of importation:

Schedule 6, Part 3, Subpart F:

Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:

	Of iron or steel:	
	Door and window frames:	
* * * * * * *		
	Columns, pillars, posts, beams, girders, and similar structural units:	
	Not in part of alloy iron or steel:	
* * * * * * *		
	In part of alloy iron or steel:	
652.95	In part of stainless steel.....	6% ad val.
652.96	Other	5.5% ad val.
652.98	Other	9.5% ad val.

As noted, plaintiff contends that the imported merchandise is classifiable under item 652.96, with duty at 5.5% ad valorem, whereas Customs has classified the merchandise under item 652.98, with duty at 9.5% ad valorem.

The question presented, therefore, is whether, within the meaning of the competing tariff provisions, the imported merchandise is classifiable under item 652.98, the provision covering bridges, bridge sections, structures and parts of structures of base metal, as classified by Customs, or under item 652.96, the provision encompassing "Columns, pillars, posts, beams, girders, and similar structural units," in part of alloy iron or steel, as claimed by plaintiff. In order to decide this question, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed. Cir. 1984); *E.R. Hawthorne & Co.* v. *United States*, 730 F.2d 1490, 1490 (Fed Cir. 1984).

The parties have agreed to a stipulation of the facts, and each has moved for summary judgment pursuant to Rule 56 of the Rules

of the Court. Since there is no issue as to any material fact, the case may properly be decided on the parties' cross-motions for summary judgement. *See B&E Sales Co.* v. *United States,* 9 CIT ——, Slip Op. 85–22, at 5 (Feb. 28, 1985); *C.J. Tower & Sons of Buffalo, Inc.* v. *United States,* 68 Cust. Ct. 17, 22, C.D. 4327, 336 F. Supp. 1395, 1399 (1972), *aff'd,* 61 CCPA 90, C.A.D. 1129, 499 F.2d 1277 (1974).

After a careful examination of the stipulated facts, the pleadings and supporting papers, the pertinent tariff provisions, and the relevant case law, it is the determination of the Court that Customs has correctly classified the imported merchandise under item 652.98, TSUS.

The imported merchandise consists of the necessary parts and accessories of unassembled bridges or bridge sections, including columns, beams, girders, bolts, nuts, brackets, plates, hinges, drain boxes, railing, bridge shoes, and railing anchors. All parts and accessories are made of steel, in part of alloy. The merchandise, as imported, was ready for erection into bridge sections, and was later assembled into specific bridge sections of the Anchorage Port Access Bridge project in Anchorage, Alaska.

Plaintiff contends that the imported parts of bridge sections are "similar structural units" to "[c]olumns, pillars, posts, beams, [and] girders," within the ambit of the superior heading to item 652.96. In support of its position, plaintiff cites the canon of construction, *ejusdem generis*. The Court, however, has concluded that, since the imported merchandise is in fact more than these structural units, this guide to statutory interpretation provides no support for the plaintiff's contention that the imported merchandise is classifiable under item 652.96.

Ejusdem generis, which means literally, of the same class or kind, teaches that "where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described." *United States* v. *Damrak Trading Co.,* 43 CCPA 77, 79, C.A.D. 611 (1956). The doctrine of *ejusdem generis* is "a specific application or illustration of the broader maxim *noscitur a sociis,* i.e., known by its associates." *Economy Cover Corp.* v. *United States,* 76, Cust. Ct. 130, 132, C.D. 4645, 411 F. Supp. 783, 784 (1976). In *Economy Cover Corp.*, the court explained:

> In essence, *ejusdem generis* means that when general words in a statute follow a specific enumeration of persons or things, the general words are not to be construed in their widest sense of meaning, but rather are to be limited, or held to apply, only to persons or things of the same kind or class as those specifically enumerated.

Id.; see Oxford Int'l Corp. v. *United States,* 75 Cust. Ct. 58, 68, C.D. 4608 (1975); *Nomura (America) Corp.* v. *United States,* 62 Cust. Ct.

524, 530, C.D. 3820, 299 F. Supp. 535, 540 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971).

As applicable to customs classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms. *See Economy Cover Corp., supra,* 76 Cust. Ct. at 132, 411 F. Supp. at 784–85; *Stylo Matchmakers Int'l* v. *United States,* 73 Cust. Ct. 78, 83, C.D. 4556 (1974). In order for plaintiff's classification to prevail, therefore, it must be established that the imported parts of bridge sections are structural units similar to columns, pillars, posts, beams and girders. *See United States* v. *Bruckmann,* 65 CCPA 90, 93, C.A.D. 1211, 582 F.2d 622, 625 (1978); *J. Ray McDermott & Co.* v. *United States,* 69 Cust. Ct. 197, 205, C.D. 4394, 354 F. Supp. 280, 286 (1972); *Laurence Myers Scaffolding Co.* v. *United States,* 57 Cust. Ct. 333, 339, C.D. 2809, 259 F. Supp. 874, 878 (1966).

In *Laurence Myers Scaffolding Co.* v. *United States,* 57 Cust. Ct. 333, C.D. 2809, 259 F. Supp. 874 (1966), certain bridge overhang shores, highway shores, and building shores, used to support concrete form work, were classified under item 657.20, TSUS, as other "[a]rticles of iron or steel," not specifically provided for elsewhere in the tariff schedules. The plaintiff argued that the merchandise was properly classifiable under item 652.94 as "columns, pillars, posts, beams, girders and similar structural units," not in part of alloy iron or steel. In analyzing the common meaning of columns, pillars and posts, the court noted that the one common characteristic of these terms was that they offered firm upright support to a building or structure. *Id.* at 340, 259 F. Supp. at 879. In addition, the court found that the structural members were of unitary construction. Since the building shores at issue comprised tubular uprights, fastened together by coupling pins, braced by cross bars and adjusted by stopper pins and an incorporated jack, the court found the shores were composite articles. Thus, the court held that the shores were "not similar structures to columns, pillars and posts within the common meaning of those terms but were in fact more than said designated structural units * * *." *Id.*

The decision in *J. Ray McDermott & Co.* v. *United States,* 69 Cust. Ct. 197, C.D. 4394 (1972), is in accord with this holding. At issue in *McDermott* were two steel components for an offshore oil drilling platform which were described as a "jacket section" and a "box girder." Both units were classified under item 652.98 as "[o]ther" structures or parts of structures of base metal. The plaintiff claimed that both units were properly classifiable under item 652.94 as "[c]olumns, pillars, posts, beams, girders, and similar structural units," not in part of alloy iron or steel. Analyzing each imported component separately, the court held that the "box girder" should have been classified as a "girder" under item 652.94 because it served the single function of providing vertical support

for the rig above it. The court found, however, that the platform jacket's primary function was not to provide upright support, but to protect the pipe piles from the elements. Since the unit's function was not primarily support, the court held that the imported "jacket section" could not be considered a similar structural unit to columns, pillars, and posts. 69 Cust. Ct. at 205. It is significant to note that the imported jacket, although comprised of steel, was classified under item 652.98.

Thse decisions make it clear that the terms columns, pillars, posts, beams, and girders refer to units that offer either vertical or horizontal support to a structure. Lexicographic authorities are in accord with this interpretation. For example, the Random House Dictionary of the English Language (unabr. ed. 1973) provides the following definitions:

> Column: a rigid, relatively slender, upright support, composed of relatively few pieces.

Id. at 292.

> Pillar: an upright shaft or structure * * * relatively slender in proportion to its height * * *.

Id. at 1092.

> Post: a strong piece of timber, metal, or the like, set upright as a support * * *.

Id. at 1122.

> Beam: any of various relatively long pieces of metal, wood, stone, etc., manufactured or shaped esp. for use as rigid members or parts of structures or machines
> * * * *Engineering.* A rigid member or structure supported at each end, subject to bending stresses from a direction perpendicular to its length.

Id. at 129.

> Girder: a large beam * * * for supporting masonry, joists, purlins, etc.

Id. at 598.

Pertinent definitions indicate that columns, pillars and posts provide upright support, while beams and girders provide support against stresses or forces from a direction perpendicular to their lengths. All of these units are described as relatively slender in relation to their lengths or heights.

In this case, neither party contends that the different types of units comprising the bridge sections should be classified separately. Indeed, under the doctrine of entireties, when an importer imports a set of components designed to form a saleable unit, the merchandise is classifiable as that unit. *See, e.g., Lafayette Radio Elec. Corp.* v. *United States,* 57 CCPA 62, 66, C.A.D. 977, 421 F.2d 751, 754 (1970); *United States* v. *Mannesmann Meer, Inc.,* 54 CCPA 24, 26–27,

C.A.D. 897 (1966). Since the parties have stipulated that the imported merchandise consists of all the parts necessary to construct complete bridge sections, the merchandise was properly classified together.

There is no question that some of the imported units are columns, beams, and girders. Many other components of the imported merchandise, however, such as bolts, nuts, brackets, plates, hinges, drain boxes, railing, bridge shoes, and railing anchors, cannot be considered similar structural units to columns, beams, or girders. Clearly, these other parts are different or more than the enumerated units because they serve different functions than providing support. Since they are not of the same class or kind as columns, pillars, posts, beams and girders, plaintiff is not aided by the canon of *ejusdem generis.* Moreover, a bridge or bridge section is more than a column, beam or girder. In short, although the imported parts of bridges and bridge sections may be structural units, these units, classified as an entirety, cannot be considered "similar structural units" to columns, pillars, posts, beams and girders. Hence, they were not classifiable under item 652.96, and were properly classified by Customs under item 652.98.

Plaintiff argues that the imported merchandise cannot be classified under item 652.98 because that item only covers products made of base metals other than iron or steel. This contention, however, is without merit.

The superior headings to items 652.96 and 652.98, TSUS, can best be reviewed by examining each heading individually. Since the broadest superior heading enumerates or lists "bridges," "bridge sections," and "parts" *eo nomine,* it is clear that the imported bridge sections are specifically described under this heading. This superior heading is then subdivided or broken down by the subheading "[o]f iron or steel," Under the heading, "[o]f iron or steel." are only two subordinate headings: "[d]oor and window frames," and "[c]olumns, pillars, posts, beams, girders, and similar structural units."

General Interpretive Rule 10(c)(i) of the Tariff Schedules of the United States provides: "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby." As a matter of statutory interpretation, the Court finds that the heading "[o]f iron or steel" is limited by its two inferior headings. Therefore, the coordinate heading for "[o]ther" may include structures of iron or steel that are not covered by the inferior headings.

In its brief, plaintiff argues that these two headings, "[d]oor and window frames" and "[c]olumns * * * and similar structural units," which encompass items 652.90 through 652.96, "cover all structures and parts of structures enumerated in the superior heading which are of iron or steel, without exception." Plaintiff's Brief, at 7. Thus, according to plaintiff's reading of the statute, all of the items listed in the primary heading, such as "hangars and

other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, shutters [and] balustrades," if made of iron or steel, must be classified either as door and window frames, or as columns, pillars, posts, beams, girders, and similar structural units. Clearly, this result is untenable.

In order to avoid this anomalous or absurd result, and to effectuate the legislative intent, the two subordinate headings, "door and window frames" and "columns * * *" must be read to limit the superior heading "[o]f iron or steel." *See* General Interpretive Rule 10(c)(i). Thus, the coordinate basket provision, item 652.98, must be read to include not only structures and parts of base metal other than iron or steel, but also structures and parts of iron or steel that are not included in items 652.90 through 652.96. Since the imported bridge parts cannot be classified under item 652.96, they are properly classifiable under the basket provision, item 652.98.

It may be noted that the subsequent legislative history of these provisions of the TSUS sheds light on the question presented in this case. In July 1979, Schedule 6, Part 3, was amended by the Trade Agreements Act of 1979, Pub. L. No. 96–39, § 1107(d), 93 Stat. 313. The statute now provides, in pertinent part:

	Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:	
	Of iron or steel:	
* * * * * * *		
	Columns, pillars, posts, beams, girders, and similar structural units:	
* * * * * * *		
	In part of alloy iron or steel:	
652.95	In part of stainless steel	4.2%
652.96	Other	3.9%
652.97	Offshore oil and natural gas drilling and production platforms	9.7%
653.00	Other	9.7%
653.01	Other	9.7%

The effect of this change was to add a basket provision for "other" under the subheading "of iron or steel." Thus, iron and steel structures not specially provided for under the other subheadings will now fall under item 653.00. The stated intent of Congress in amending the statute was to "reduce ambiguity and confusion in the use of the TSUS" without changing the rates of duty or classification of merchandise. *See* S. Rep. No. 249, 96 Cong., 1st Sess. 266, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 652. The

Report of the House Ways & Means Committee states that the "[r]earrangement of the provisions is intended to clarify and ease the classification of these articles without effecting any changes in the rates of duty." H.R. Rep. No. 317, 96th Cong., 1st Sess. 194 (1979). The Senate Finance Committee agreed that no substantive change was intended. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 266, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 652.

In comparing the TSUS provisions under consideration with the current sections as amended, it is clear that the legislature intended to apply the same tariff to all bridges, bridge sections, and other structures of base metal not set forth in the subordinate headings, without regard to their steel and iron content. Under the 1979 amendment, bridge sections, in part of alloy steel, are classified under item 653.00, TSUS, and are assessed the same duty as structures of base metal other than iron and steel. This result is in accord with the Court's holding in this case.

Based upon an examination of the stipulated facts and other submissions of the parties, applicable statutory and judicial legal authority, it is the determination of the Court that the imported merchandise in issue was properly classified by Customs under item 652.98, TSUS.

Since the imported merchandise was properly classified under item 652.98 of the tariff schedules, plaintiff's protest is denied and the action is dismissed. Judgment will issue accordingly.

(Slip Op. 86–28)

ILWU LOCAL 142, PLAINTIFF *v.* RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES, DEFENDANT

Court No. 83–5–00779

Before RE, *Chief Judge.*

ON DEFENDANT'S MOTION FOR REHEARING

[Motion denied.]

(Dated March 13, 1986)

King, Nakamura & Chun-Hoon (*James A. King*), for the plaintiff.
Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff*), for the defendant.

RE, *Chief Judge:* Pursuant to Rule 59(a) of the rules of this Court, defendant has moved for a rehearing of the decision in *ILWU Local 142* v. *Donovan,* Slip Op. 85–127 (Dec. 11, 1985).

In the *ILWU Local 142* case, plaintiff, on behalf of former employees of the Puna Sugar Company, challenged the Secretary of Labor's denial of certification of eligibility for benefits under the trade adjustment assistance program, 19 U.S.C. §§ 2271–2321, 2395

(1982 & Supp. I 1983). The court held that the Secretary's determination that increases of imports did not contribute importantly to the workers' separation from employment was not supported by substantial evidence contained in the record, and was not in accordance with law. Hence, on plaintiff's motion, the court vacated the Secretary's determination, and remanded the case to the Secretary for a redetermination of eligibility for trade adjustment assistance benefits. Slip Op. 85–127, at 14.

In the present motion, defendant contends that the court failed to address several issues raised in defendant's opposition to plaintiff's motion. First, defendant contends that Puna produced refined sugar, and that under 19 U.S.C. § 2272(3) "the import-impacted article must be the commodity that is *marketed,* not the article at an intermediate processing stage prior to marketing." Second, defendant contends that increased imports of raw sugar could not have contributed to the workers' separation from employment because those imports were destined for the export market under the drawback provision of 19 U.S.C. § 1313. Defendant also contends that "the fact that *other* workers producing raw sugar at *other* companies in Hawaii were certified in 1977 is irrelevant to the pending case and cannot 'provide a precedent' for certifying the workers at Puna."

After careful review of defendant's motion, the Court holds that defendant has not satisfied the requirements for the granting of a rehearing, and the motion is denied.

The cases make clear that whether a motion for rehearing shall be granted or denied lies within the sound discretion of the court. *Oak Laminates* v. *United States,* 8 CIT 300, 601 F. Supp. 1031, *denying reh'g to* 8 CIT 176 (1984), *aff'd,* No. 85–1873, slip op. (Fed. Cir. Feb. 11, 1986); *see also Reynolds Trading Corp.* v. *United States,* 61 CCPA 57, 59, C.A.D. 1120, 496 F.2d 1228, 1230 (1974). In addition, Rule 59(a) of the rules of this Court provides that a rehearing may be granted "for any of the reasons for which rehearings have heretofore been granted in suits of equity in the courts of the United States * * *."

In *W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358, C.R.D. 72–5 (1972), the appropriate grounds for the granting of a rehearing were set out as follows:

> A rehearing may be proper when there has been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

Id. at 358.

Defendant has failed to demonstrate any grounds that would justify the granting of its motion. Moreover, the defendant's allegations of error, in addition to being insufficient as a basis for the granting of a rehearing, are without merit.

In this case, the record disclosed that Puna Sugar Company produced raw sugar. This raw sugar was "processed into refined sugar by C & H Sugar Company, a cooperative owned by the 15 Hawaiian sugar companies." Slip Op. 85–127, at 5. C & H then marketed the refined sugar for all of the sugar companies. In its original motion for review, plaintiff argued that the "increased imports of raw short and sugar contributed importantly to the workers' separation, and that it never contended * * * that imports of refined sugar impacted adversely on the Puna workers or their employer." In opposition to plaintiff's motion, and again in this motion for rehearing, defendant contends that Puna produced refined sugar. It also contends that under the adjustment assistance program "the import-impacted article must be the commodity that is *marketed,* not an article at an intermediate processing stage prior to marketing." These contentions are without merit.

The Court of International Trade reviews a determination by the Secretary of Labor that denies certification of eligibility for adjustment assistance to assure that the determination is supported by substantial evidence and is in accordance with law. 19 U.S.C. § 2395(c); *see Woodrum* v. *Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd,* 737 F.2d 1575 (Fed. Cir. 1984). The findings of fact by the Secretary are conclusive if supported by substantial evidence contained in the record. 19 U.S.C. § 2395(b).

In this motion, and in its memorandum in support of the Secretary's determination, counsel for the defendant contends that Puna did not produce refined sugar. Plaintiff's petition for adjustment assistance which was filed with the Department of Labor states that Puna produced raw sugar. In the negative determination on reconsideration of the workers' petition, the Secretary stated that "[r]aw sugar production coming from [Puna] is refined by the California and Hawaii Sugar Company (C & H) in San Francisco for consumption on the U.S. mainland." 48 Fed. Reg. 14,073 (1983). In addition, in the agency's notice which stated that it had instituted an investigation into the workers' petition, under the heading "articles produced," Puna is stated to produce "sugar cane—grow sugar—raw & molasses." 47 Fed. Reg. 12,402 (1982). Hence, it is clear that the Secretary found that Puna produced raw sugar and sent it to C & H for refining. The contention that Puna did not produce raw sugar was advanced for the first time by defendant's counsel in its memorandum in opposition to plaintiff's motion for review of the record.

Previous decisions of this court make clear that "the governing statutes contemplate a scheme of judicial review which is based on the record before the decision maker." *Sugar Workers Union* v.

Donovan, 8 CIT 350, Slip Op. 84-138, at 4-5 (Dec. 28, 1984) (construing 28 U.S.C. § 2640(c) & 19 U.S.C. § 2395); *see also Abbott* v. *Donovan,* 3 CIT 54, 55 (1982). Furthermore, it is a fundamental principle of administrative law that agency action must be upheld on the basis articulated by the agency, and not by *post hoc* rationalizations of counsel. *See, e.g., Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). This "simple but fundamental rule" has been stated as follows:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.

SEC v. *Chenery Corp.,* 332 U.S. 194, 196 (1947).

In this case, the court reviewed the Secretary's determination on the basis of the record and the Secretary's summary of decision. 19 U.S.C. § 2395(c). It cannot be doubted that the Secretary found that Puna produced raw sugar. Accordingly, in light of the facts contained in the administrative record, and the findings and reasons articulated by the Secretary, the Court must reject defendant counsel's contention that Puna produced refined sugar.

The Court also rejects defendant's contention that the Secretary may not consider articles at intermediate processing stages. Section 222 of the Trade Act requires that the Secretary determine whether "increases of imports of articles *like or directly competitive with* articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof * * *." 19 U.S.C. § 2272 (Supp. I 1983) (emphasis added).

The Act defines the words "directly competitive with" as follows:

> (5) An imported article is "directly competitive with" a domestic article at an earlier or later stage of processing, and a domestic article is "directly competitive with" an imported article at an earlier or later stage of processing, if the importation of the article has an economic effect on producers of the domestic article comparable to the effect of importation of articles in the same stage of processing as the domestic article. For purposes of this paragraph, the unprocessed article is at an earlier stage of processing.

Trade Act of 1974 § 601(5), 19 U.S.C. § 2481(5) (1982); *see also* 29 C.F.R. § 90.2 (1985).

The defendant's interpretation of the "like or directly competitive with" requirement of the Act would exclude consideration of the effect of an article at an intermediate processing stage. The Court cannot accept that interpretation because it would contradict the statutory definition of the phrase "directly competitive with," as set forth in 19 U.S.C. § 2481(5). *See United States* v. *Bedell,* 506 F.2d 174, 186 n.80 (D.C. Cir. 1974); *United Steelworkers* v. *Donovan,* 10 CIT ——, Slip Op. 86-26, at 14-16 (Mar. 12, 1986).

Defendant also contends that the increased imports or raw sugar could not have contributed to the Puna workers' separation because "most of these imports were not used for domestic consumption." The record shows that the Secretary stated that "[i]n 1981, the refined sugar equivalent of more than 25 percent of total [raw sugar] imports was exported subject to drawback procedures which allowed exporters to be refunded duties and fees paid to the government on previously imported raw sugar." 48 Fed. Reg. 14,072 (1983). The Secretary, however, did not evaluate this data, nor was its relevance explained in the notice of determination.

The only apparent reason for the inclusion of the drawback data is to explain fully the domestic export market. At no point in the record does the Secretary state or imply, as counsel contends, that this data should be evaluated under the "contributed importantly" provision of the statute. 19 U.S.C. § 2272(3).

Moreover, nothing in the record, makes clear that "increased imports did not affect the domestic price of raw sugar" because the "entire increase in exports of refined sugar absorbed almost the entire increase in imports of raw cane sugar in 1981." Indeed, the record indicates that the imports of cheap raw sugar caused the price of both raw and refined sugar to decline. The United States imported 51 percent of its sugar needs in 1981, and the import-to-production ratio for raw cane and beet sugar increased from 76 to 82.1 percent in the same year. Finally, in 1982, the President proclaimed an emergency quota program which limited the amount of raw sugar that could be imported. *See* Slip Op. 85–127, at 6.

The Secretary is directed by the statute to determine whether increases in imports "contributed importantly" to the workers' separation from employment. The record clearly reveals that imports of raw sugar increased significantly in the period prior to separation. The fact that some of these imports were later exported does not relieve the Secretary of the responsibility for assessing their original impact upon importation.

There is nothing in the record, and it seems contrary to logic, to suggest that, because these sugar products were exported after processing, the original influx of these products into the United States had no effect on the market. Indeed, it seems reasonable to suggest that, because of the drop in domestic sugar prices caused by the increase in imports, importers decided to take advantage of the drawback provisions and export their refined sugar rather than sell at the low domestic price.

Hence, since the Secretary chose not to evaluate the drawback data under the contributed importantly test of the Act, or explain the data's relevance to the workers' petition, the Court must reject counsel's explanation of the agency determination.

Defendant's final contention is that the certification of sugar workers at other plantations in Hawaii is irrelevant to the Puna workers' petition. In its judicial opinion in this case, the Court

found that "the Secretary did not sufficiently explain why the earlier 1977 certification of workers producing raw cane sugar in Hawaii did not 'provide a precedent.'" Slip Op. 85–127, at 13. Hence, the court ordered the Secretary to explain his reasons for decision. This order comports with the requirement of fairness that an agency explain the disparate treatment of similarly situated applicants. *See, e.g., ACTWU Local 1627* v. *Donovan,* 7 CIT 212, 587 F. Supp. 74, 78 (1984); *Contractors Transport Corp.* v. *United States,* 537 F.2d 1160 (4th Cir. 1976). Hence, if the agency "does not alter its decision, it should explicitly state its reasons for the apparently inconsistent treatment" of the workers. 537 F.2d at 1162; *see International Union* v. *Marshall,* 584 F.2d, 390, 397 (D.C. Cir 1978).

Therefore, after careful consideration of the arguments of the parties, the facts contained in the administrative record, and the statement of reasons provided by the Secretary, the Court holds that defendant has not demonstrated a "significant flaw" in the original proceeding, and its motion for rehearing is denied. The case is remanded to the Secretary for redetermination of the certification of eligibility. Of course, it is "within his discretion to make a new determination, with new findings and reasons." *International Union,* 584 F.2d at 398. It is ordered that the Secretary shall certify the record on remand, and report to the Court the results of the further proceedings within 30 days of the date of this opinion and order.

(Slip Op. 86–29)

KOKUSAI ELECTRIC CO. LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, E.F. JOHNSON CO., DEFENDANT-INTERVENOR

Court Nos. 85–02–00185 and 85–02–00187

Before CARMAN, *Judge.*

[Judgment for defendant.]

(Decided March 14, 1986)

Arent, Fox, Kitner, Plotkin & Kahn (*Margaret Roggensach, Esq.,* on the motion) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Wayne W. Herrington, Esq.,* on the motion), for the defendant.

Robbins, Zelle, Larson & Kaplan (*Jann L. Olsten, Esq.,* on the motion) for the defendant-intervenor.

CARMAN, *Judge:* Plantiff challenges in two separate law suits the determination of the United States Department of Commerce (Commerce), Court No. 85–02–00185, and the determination of the International Trade Commission (Commission), Court No. 85–02–00187. Since both cases arose out of the same facts and the same investi-

gation they have been combined for the purposes of discussion in this opinion.

In Court No. 85-02-00185, the Commerce case, plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record, contending the determination of Commerce pursuant to an antidumping petition that cell site transceivers imported from Japan were being sold or were likely to be sold at less than fair value (LTFV), extended to dedicated subassemblies, was not supported by substantial evidence and was otherwise not in accord with the law.[1] In Court No. 85-02-00187, the Commission case, plaintiff makes a similar motion challenging the Commission's determination in the same investigation that the LTFV imports are materially injuring an industry in the United States. Defendant United States and defendant-intervenor oppose the motions in each case. The Information and Telecommunications Technologies Group of the Electronic Industries Association appeared as *amicus*. For the reasons stated below, the determinations of both Commerce and the Commission are sustained.

FACTS

Defendant-intervenor filed on December 28, 1983 with Commerce and the Commission an antidumping petition captioned "In the Matter of Cell Site Transceivers and Subassemblies Thereof From Japan." The allegations in the petition and the Request for Relief complained of dumping of cell site transceivers from Japan. The petition contained no allegations with respect to related subassemblies as such. Court Nos. 85-02-00185 and 85-02-00187 Records at Doc. 1 (hereinafter Petition). On January 25, 1984 Commerce published notice of the initiation of its investigation. The notice was styled "Cell Site Transceivers and Related Subassemblies From Japan" and indicated the investigation was to determine whether cell site transceivers and related subassemblies from Japan were being or likely to be sold in the United States at less than fair value. 49 Fed. Reg. 3100 (1984). The preliminary determination of Commerce published on June 12, 1984, captioned "Cell Site Transceivers From Japan," indicated the investigation covered cell site transceivers and related subassemblies. 49 Fed. Reg. 24,155 (1984). The notice made an affirmative preliminary determination of sales at less than fair value as to cell site transceivers and ordered suspension of their liquidation. The final determination of Commerce published October 26, 1984, again captioned "Cell Site Transceivers From Japan," reiterated that the scope of the investigation included cell site transceivers and related subassemblies. 49 Fed. Reg.

[1] Cell site transceivers and related subassemblies are part of radio frequency (RF) equipment in the base station (cell site) of a cellular radio communication system. Apparently the RF equipment functions as a locating receiver and provides simultaneous two way voice and data communication between the base station and the subscriber's mobile phone by using different frequencies to transmit and receive. Subassemblies are an assemblage of components dedicated for use in the cell-site transceivers which were the subject of the investigation. 49 Fed. Reg. 3100, 3101 (1984).

43,080 (1984). The final determination found cell site transceivers from Japan were being sold in the United States at less than fair value. The overall weighted average margin on all sales compared was 59.94 percent. There was no separate determination pertaining to related subassemblies as such.

Subsequent to the publication of the preliminary determination of Commerce, the Commission commenced its final injury investigation by notice on July 5, 1984. 49 Fed. Reg. 27,641 (1984). In its final investigation the Commission issued questionnaires that separately identified cell site transceivers and subassemblies. Plaintiffs argued before the Commission that subassemblies should be excluded from its investigation or alternatively the Commission should make a negative injury determination in regard to importation of subassemblies, contending Commerce made no determination that subassemblies were being sold at less than fair value. Court No. 85-02-00185, Plaintiff's brief 9.

On November 27, 1984 staff members of the Commission questioned by phone the staff of Commerce to ascertain whether or not "related assemblies" of cell site transceivers were included within the investigation and final determination of Commerce. Commerce advised that the omission of subassemblies from the suspension of liquidation section of each of the notices in the Federal Register was in error and further indicated that import administration had contacted Customs to clarify that liquidation of entries from Japan of any subassemblies in question should be suspended and the duty for cell site transceivers should apply to subassemblies as well. Letter from Deputy Assistant Secretary for Import Administration, Commerce to Chairwoman Paula Stern, International Trade Commission, Pub. Doc. 143. (Exhibit 13, chronology of documents requested by Court at Oral Argument.)

In December 1984 the Commission published its determination in a report entitled "Cell-Site Transceivers and Subassemblies Thereof From Japan." U.S.I.T.C. Public. 1618, Investigation No. 731-TA-163 (Final) (1984). On January 3, 1985 Commerce published an antidumping duty order covering both cell site transceivers and related subassemblies. 50 Fed. Reg. 307 (1985).

As to Commerce's determination, plaintiff maintains that Commerce should not have included subassemblies in its final antidumping order on the following grounds:

1. The petition contained no allegations with respect to subassemblies and failed to request relief from subassembly imports, and Commerce improperly initiated its investigation covering cell site transceivers and related subassemblies.
2. Commerce did not make a final determination that subassemblies were the same class or kind of merchandise as cell site transceivers.
3. Commerce did not have legal authority to issue a final antidumping order that expanded the final determination to include subassemblies with cell site transceivers.

4. The record did not support a determination of sales at less than fair value with respect to subassemblies since the record established there were no sales of subassemblies during the period of investigation.
5. Plaintiff should not be barred by the doctrine of laches from asserting that subassemblies should not have been included in the final antidumping order because plaintiff acted in a timely manner and defendant-intervenor suffered no injury.

Defendant argues that since cell site transceivers and related subassemblies thereof were consistently defined as "one class or kind" of merchandise throughout the investigation, Commerce was not required to make a separate determination of less than fair value as to subassemblies for them to be covered by the final determination and antidumping orders. Defendant contends further that plaintiff is barred from challenging the inclusion of the subassemblies in the class or kind of merchandise because it failed to exhaust its administrative remedies by failing to raise the issue before Commerce during the investigation. Defendant-intervenor and the *amicus* support defendant's contentions.

As to the Commission's determination, plaintiff also maintains that the Commission should not have included subassemblies in its final injury determination on the following grounds:

1. Subassemblies were not properly included in the Commission's final investigation because Commerce made a determination of LTFV sales only with respect to cell site transceivers and not with respect to subassemblies.
2. The Commission's final determination of injury is not supported by substantial evidence on the record.
3. The doctrine of laches is inapplicable since plaintiff asserted its claim in a timely fashion and defendant-intervenor suffered no harm.

Defendant argues that Commerce's determination of LTFV sales included both cell site transceivers and subassemblies, and that the Commission properly considered subassemblies.

OPINION

I. *The Commerce Determination*

Antidumping duties are to be imposed if Commerce determines that:

> a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value and the Commission determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise.

19 U.S.C. § 1673 (1982). Procedures for the initiation of antidumping proceedings are set out at 19 U.S.C. § 1673a as follows:

> (a) Initiation by administering authority.—An antidumping duty investigation shall be commenced whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty * * * exist.
>
> (b) Initiation by petition.—
>
> (1) Petition requirements.—An antidumping proceeding shall be commerced whenever an interested party * * * files a petition with the administering authority, on behalf of an industry which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit.

While it might have been better practice for the petitioner to have made specific allegations in regard to "related subassemblies" in the petition, it is clear that the petition's sweeping description of cellular technology and proposed cellular systems operations in the United States, together with its description of circumstances indicating sales at less than fair value, were sufficient to cover cell site transceivers as well as their related subassemblies. Petition at 7-18). At the beginning and throughout the investigatory process Commerce treated cell site transceivers and their related subassemblies as part of the same class or kind of merchandise. The Notice of Initiation of Investigation, 49 Fed. Reg. at 3100, the Preliminary Determination, 49 Fed. Reg. at 24,155, the Final Determination, 49 Fed. Reg. at 43,081, and the Antidumping Duty Order, 50 Fed. Reg. at 307, all indicate the scope of the investigation covered "cell site transceivers and related subassemblies."

Moreover, Commerce's contacts with plaintiff during the course of the investigation indicate that the scope of the investigation included subassemblies. On March 2, 1984 Commerce sent plaintiff a request for information. The request was accompanied by a letter, which stated in part:

> We are presently conducting an antidumping investigation involving cell site transceivers and related subassemblies from Japan. The merchandise covered by this investigation is part of the radio frequency (RF) equipment in the base station (cell site) of a cellular radio communication system. This single package RF equipment functions as a locating receiver and provides simultaneous two-way voice and data communications between the base station and the subscriber's mobile telephone by using different frequencies to transmit and receive. Subassemblies are an assemblage of component parts dedicated for use in cell site transceivers as defined above. *Cell site transceivers and related subassemblies* are currently classified under item number 685.2976 of the *Tariff Schedules of the United*

> *States Annotated (TSUSA).* For your convenience, we have enclosed a description of the applicable TSUSA items.

Court No. 85-02-00185 Record at Doc. 24 (emphasis added). The request for information sent to plaintiff covered both cell site transceivers and related subassemblies. *Id.* at Doc. 23. Plaintiff responded to the portions of the questionnaire covering subassemblies, indicating that it had not sold cell site transceiver assemblies in the United States, third countries, or Japan. *Id.* at 38, response at 5. Furthermore, since the petitioner could not obtain samples of the merchandise and since plaintiff was presumably the only one that had them, no subassemblies having been imported into the United States, there was not adequate information in regard to the related subassemblies to enable the preparers of the petition to be more specific.

In any event plaintiff was aware from the very beginning that the antidumping investigation included the related subassemblies and that they were being treated by Commerce as the same class or kind of merchandise as cell site transceivers. At no time during the course of the investigation before Commerce, to and including the publication of the final determination, did plaintiff raise any question of whether or not subassemblies were included within the scope of the investigation or dispute. The fact that plaintiff endeavored to raise the issue before the publication of the final Order was of no effect since the issuance of the final antidumping Order was a ministerial act and not the final expression of the administrative determination. *Royal Business Machines, Inc.* v. *United States,* 1 CIT 80, 86, 507 F. Supp. 1007, 1012 (1980).

Plaintiff did raise the issue of whether or not the related subassemblies were included within the scope of the investigation; not before Commerce but before the Commission, which was in the process of making its final injury determination. Plaintiff clearly could have raised the issue before Commerce during the investigation and Commerce could have examined the objection to the scope of the investigation at that time. Instead, plaintiff slept on its rights. It did not raise the question until the matter reached the Commission. Laches would prevent plaintiff from raising the issue after the final determination by Commerce.

The Court does not have to rely upon laches, however, since plaintiff clearly failed to exhaust its administrative remedies. Generally, a reviewing court would usurp the function of the agency if it were to set aside an administrative determination upon a ground not previously presented, thereby depriving the agency of a chance to consider the matter. *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U.S. 143, 145 (1946). It has been stated:

> The law is not in accord either with an absolute statement that a reviewing court may not decide an issue not raised before the agency or with an absolute statement that a reviewing court may decide such an issue. The law is that the review-

ing court has power to exercise discretion in the light of the circumstances and the court's idea as to what justice requires. 4. K. Davis, Administrative Law Treaties, § 26:7 at p. 444 (2d ed. 1983).[2]

The Court holds that in the absence of extraordinary circumstances excusing the neglect to raise before Commerce the issue whether or not the related subassemblies were within the scope of the investigation, the Court will not permit the plaintiff to raise the issue after Commerce closed its investigation. The Court finds not only did plaintiff fail to offer an excuse for not raising the issue before Commerce, but further plaintiff participated in the Commerce investigation proceedings as though related subassemblies were within the scope of the investigation. Plaintiff cannot be heard to complain at this juncture in the proceedings that the issue, which it wished to have considered but never brought up before Commerce, did not receive full consideration.

Even if the petition had been insufficient, Commerce had the authority to self-initiate an antidumping investigation as to the related subassemblies to determine whether or not the elements necessary for the imposition of duties existed. *See* 19 U.S.C. § 1673a(a)(1982). Commerce also has power to reconsider decisions to initiate an investigation into alleged violations of antidumping regulations. *Gilmore Steel Corp.* v. *United States*, 7 CIT 219, 585 F. Supp. 670 (1984).

As to plaintiff's motion for judgment upon the agency record regarding Commerce's determination, Court No. 85-02-00185, the Court holds:

(1) The allegations in the petition were sufficient and included subassemblies. Even if the petition were inadequate under the circumstances of this case Commerce had the power to self-initiate an investigation of related subassemblies.

(2) The final determination of Commerce included subassemblies as the same class or kind of merchandise as cell site transceivers.

(3) Commerce had the legal authority to issue the final dumping order which implemented its final determination and in-

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[2] The Trade Agreements Act of 1979, eliminated *de novo* review and provided that judicial review under the antidumping and the countervailing duty law be upon the administrative record. 19 U.S.C. §§ 1516(a)(2) and (b)(1)(B).
The legislative history of the Act is interesting. H.R. Rep. No. 317, 96th Cong., 1st Sess. 181 (1979) states:
"The Bill further amends present law to eliminate *de novo* review of determinations or assessments made pursuant to the antidumping and countervailing duty laws. The present standard of *de novo* review is both time consuming and duplicative. The rationale for *de novo* review is the need to safeguard the rights of all parties to an antidumping and countervailing duty proceedings [sic] which are informal and nonadversial and not subject to Administrative Procedure Act (APA) requirements. However, the amendments made by Title I of the Bill providing for substantially increased access by all parties to information upon which the decision of the administering authority or the ITC is based together with the requirement of a record of the proceedings has removed the need for review of this type. Therefore, the Bill generally provides for a standard of review whereby the administrative level determination is upheld unless unsupported by substantial evidence on the record. Reviewable interlocutory determinations as well as final determinations made so early in the proceedings as to preclude the development of an adequate record, e.g., a determination not to initiate an investigation upon a receipt of a petition, will be upheld unless found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

cluded subassemblies with cell site transceivers in implementing the final determination.

(4) The record amply supports a determination of sales at less than fair value with respect to subassemblies since they were treated as one class or kind of merchandise throughout the investigation.

(5) Although plaintiff would ordinarily be barred by the doctrine of laches from asserting that subassemblies should not have been included in the final antidumping order because plaintiff failed to act in a timely manner by raising the issue before Commerce, the failure by plaintiff to exhaust its administrative remedies by raising the issue before Commerce precludes plaintiff from raising the issue before this Court.

II. *The Commission Determination*

When Commerce makes an affirmative determination that merchandise is being dumped, it is required to notify the Commission immediately and "make available to the Commission such information as it may have relating to the matter under investigation." 19 U.S.C. § 1673a(d)(1982). In making its final injury determination, the Commission is governed by 19 U.S.C. § 1673d(1)(b), which provides in relevant part:

> (1) In General.—The Commission shall make a final determination of whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, *by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination* under subsection (a)(1) of this section. (Emphasis added.)

Plaintiff's first challenge to the Commission's determination in this case is that the Commission improperly considered subassemblies in its investigation because the subassemblies were not properly included in Commerce's determination. Since the Court finds that Commerce's determination did properly encompass subassemblies, plaintiff's first challenge must fail. The Commission had before it a determination of Commerce that included subassemblies as well as cell site transceivers, and therefore the Commission properly considered those subassemblies.

Plaintiff also argues that the Commission's determination as to subassemblies is not supported by substantial evidence in the record because the Commission did not make separate findings of fact or conclusions of law regarding subassemblies. As noted earlier, Commerce's investigation treated the subassemblies as the same class or kind of merchandise as cell site transceivers. The Commission in its determination therefore properly investigated injury to only one domestic industry—the industry producing cell site transceivers and related subassemblies. The Commission was not required to make separate findings of fact as to subassemblies as its

investigation covered only one industry. Moreover, it is clear from the record that the Commission had before it information regarding both cell site transceivers and their related subassemblies.

Because the Court finds that the Commission's determination is supported by substantial evidence on the record and in accordance with law, it is unnecessary to address the question whether plaintiff's challenge is barred by laches. Accordingly, the Court holds:

> (1) The Commission properly considered cell site transceiver subassemblies because they were within the scope of Commerce's determination.
>
> (2) The Commission's determination that a domestic industry is injured is supported by substantial evidence on the record because the Commission properly treated the manufacture of cell site transceivers and related subassemblies as one industry and had before it information regarding both.

III. *Conclusion*

Both Commerce's determination, challenged in Court No. 84-02-00185, and the Commission's determination, challenged in Court No. 84-02-00187, are supported by substantial evidence on the record and otherwise in accordance with law. Both determinations are therefore sustained, and plaintiff's motions in both cases are denied.

ABSTRACTED CLASSIFICAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	
C86/25	Re, C.J. March 12, 1986	Childcraft Education Corp.	73-11-03255, etc.	Item 737.90 17.5%	I
C86/26	Re, C.J. March 12, 1986	Marvell, Inc.	80-1-00005, etc.	No allowance under item 807.00 was made for fabric components, product of U.S. subjected to buttonhole and/or slit operations during assembly of the imported garments	F
C86/27	Carman, J. March 13, 1986	E. Gluck Corp.	83-9-01273	Item 715.05 Various rates for modules Item 720.24 or 720.28 Various rates for cases Item 740.35 Various rates for bands	I I

FICATION DECISIONS

) rate	HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item 678.50 5¢%	Childcraft Education Corp. v. U.S. 742 F.2d 1413 (1984)	New York "Touch and Match" and cassettes and/or cards for "Touch to Learn"
ıade .S. nd/ ıbly ted	Fabric components of U.S. origin subjected to buttonhole and/or pocket slit operations during foreign assembly of imported garments are subject to duty allowance afforded by item 807.00	U.S. v. Mast Industries, Inc., 668 F.2d 501 (1981)	Miami Wearing apparel
s s s s	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% Item 656.25, 657.35, 657.25, or 656.20 Various rates	Agreed statement of facts	New York Electronic LCD watches consisting of modules, modules and cases; or modules, cases, and bands; items marked "A" Cases, items marked "B"

ABSTRACTED CLASSIFICATION DECI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	
				Item No. and rate	Item N
C86/29	DiCarlo, J. March 13, 1986	Edwin M. Knowles China Co.	85–7–00916	Item 533.79 26%	Item 53 17.4%
C86/30	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80–10–01829, etc.	Item 121.59 5%, 2%, or 1%	Item A Free
C86/31	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80–10–01832	Item 121.59 5%, 2%, or 1%	Item A Free
C86/32	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80–10–01833	Item 121.59 5%, 2%, or 1%	Item A Free
C86/33	DiCarlo, J. March 13, 1986	Import Leather, Inc.	80–10–01834	Item 121.59 5%, 2%, or 1%	Item A Free
C86/34	DiCarlo, J. March 13, 1986	North American Foreign Trading Corp.	84–8–01114	Item 682.95 7.3%	Item 8 Free
C86/35	DiCarlo, J. March 1986	North American Foreign Trading Corp.	84–6–00813	Item 684.62 8.5%	Item A Free

DECISIONS—Continued

HELD Item No. and rate	BASIS	PORT OF ENTRY AND MERCHANDISE
Item 534.94 17.4%	Agreed statement of facts	Baltimore Coup-shape porcelain plate blanks
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
Item A121.65 Free of duty	Leather's Best, Inc. v. U.S., 708 F.2d 715 (Fed. Cir. 1983)	Boston Leather
Item 800.00 Free of duty	Agreed statement of facts	New York American goods returned; batteries
Item A684.62 Free of duty	Agreed statement of facts	New York Mini Hand Held Telephone

ABSTRACTED VALUAT

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V86/13	Re, C.J. March 12, 1986	Chori New York, Inc.	73-12-03315	Export value	A
V86/14	Re, C.J. March 12, 1986	Nichimen Co.	73-5-01324	Export value	A
V86/15	Watson, J. March 12, 1986	Texas Instruments Inc.	82-10-01366, etc.	Constructed value	24

LUATION DECISIONS

	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
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	24.91% of entered value	Agreed statement of facts	Dallas Semiconductor devices

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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